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92-1394

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.);
TOMAS DE JESUS MANGUAL,

Petitioners,

vs.

CARMEN LUCILA DOMINGUEZ ORSINI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Whether the First Amendment requirement that a defamatory falsehood be "of and concerning the plaintiff," applies to plaintiffs who are neither public officials nor public figures under *New York Times* and its progeny.

2. Whether the requirement applies to a cause of action for invasion of privacy based on the same injurious falsehood.

3. Whether the court below committed error in not dismissing the case as mandated by the First Amendment, once it became an admitted and incontestable fact that newspaper articles did not identify nor refer to the plaintiffs, and that as a matter of law the publications were not "of and concerning" them.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

Petitioners, El Vocero de Puerto Rico (Caribbean International News Corp.) and Tomás de Jesus Mangual,[1] respectfully pray that a Writ of Certiorari issue to review the Supreme Court of the Commonwealth of Puerto Rico.

I- JUDGMENT BELOW

By Resolutions issued November 13, 1992 and December 18, 1992, the Puerto Rico Supreme Court denied review and petition for rehearing, respectively, letting stand the judgment of March 19, 1992 issued by the Superior Court of Puerto Rico, Ponce Section (Ortiz, J.), which is unpublished. A certified translation of these

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[1] Caribbean International News Corp. is a Puerto Rico corporation with offices in San Juan, which publishes the newspaper El Vocero de Puerto Rico; Tomás de Jesus Mangual is a reporter for El Vocero. Codefendants Seaboard Surety Company and WUNO NOTI-UNO, INC. (Century ML Radio Venture) answered the complaint below through independent counsel. The plaintiffs, Respondents herein, are seventeen (17) individuals who reside in Puerto Rico: Carmen Lucila Dominguez Orsini, Enrique Martinez Dominguez, Elsa Maria Maldonado Rodriguez, Raul Martinez Dominguez, Oraida Muñoz, Carlos Luis Martinez Dominguez, Carmen L. Dominguez, Carmen Martinez Bayo, Ana Selenia Dominguez Orsini, Irene Dominguez Orsini, Lourdes del Carmen Martinez Vega, Jackeline Martinez Vega, Ileana Martinez Maldonado, Lymari Martinez Maldonado, Irelys Martinez Munoz and Oraida Martinez Munoz.

documents is included in the Appendix ("App.") hereto, at pp. 1-17.

II- JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1258. The present petition is being filed within ninety days from denial of our petition for rehearing. The judgment issued by the court below is a "final judgment" reviewable by this Court, pursuant to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[2]

[2] The First Amendment issue is conclusive, and is final as to the rest of the litigation; assuming that trial had been held, the same issue would survive intact for review at a later date. Permitting the pendency of this action, a long and complicated case involving seventeen (17) plaintiffs, is not only burdensome to petitioners, but also adversely affects the exercise of First Amendment rights in Puerto Rico generally, since having to face litigation with individuals who are unnamed in news articles has an unquestionably chilling effect on legitimate expression. Reversal of the state court would terminate all litigation. It is a longstanding federal policy to give "breathing space" to the exercise of First Amendment rights, free from the encroachment of state laws. In the present case we have a "final judgment" under categories one, two and four of *Cox*. See, 420 U.S. at 479-483 and cases cited therein. See also, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-56 (1989); *Nebraska Press Asso. v. Stuart*, 423 U.S. 1327, 1329-1330 (1975); compare, *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (the state court decision not a final judgment "within any of the four exceptions identified in Cox.")

III- CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ".

Article II Sec. 8 of the Constitution of Puerto Rico: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."

Article 1802 of the Puerto Rico Civil Code, 31 L.P.R.A. Sec. 5141: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity."

IV- STATEMENT OF THE CASE

1. Statement of Facts

This is a cause of action for damages arising out of the publication of news articles in the Spanish language daily newspaper El Vocero de Puerto Rico,[3] dated February 17 and 23, 1990, and a news broadcast by local radio

[3] In Spanish, a "vocero" is a spokesman.

station W-UNO on the latter date. The main subject of these publications is the fact that Luis Martínez Bayó shot himself while at his home on January 22, 1990, and the reasons he purportedly had to commit suicide.

Respondents, relatives and in-laws of Mr. Martinez,[4] do not controvert the fact that none of them was identified or referred to in the publications, individually or as a group, directly or by innuendo, truthfully or otherwise. There is no allegation that anyone thinks that any of the respondents was referred to.

The Resolution of the court concisely summarizes the gist of the publications,

> [T]o the effect that decedent, Mr. Luis Martínez Bayó, had had carnal relations by paying a supposed prostitute called Rosana, that she died as a result of a disease called Acquired Immunodeficiency Syndrome (AIDS), that the name of Mr. Luis Martínez Bayó appeared in a list of said prostitute's clients, which list she allegedly gave to the physicians who attended to her during her illness, that said list included a group of "numbers racket mafiosi" and that Mr. Luis Martínez Bayó, upon learning that his name appeared in said list, "could not overcome the shock he received because of this chilling news and blew out his brains through a shot on the head." App. p. 1-2.

The thrust of respondents' claim is that the alleged motives behind the suicide of Mr. Martínez are false. No

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[4] Plaintiffs include the widow, the sisters, the sons, the daughters-in-law, the sisters-in-law and the granddaughters of Mr. Martínez.

allegations are made as to what were his real motives, or inferring that the media could or should have known them, or in fact knew of them.[5] The respondents seek monetary redress on two distinct grounds, but based on the same published information: damage to their reputation, and invasion of personal and family privacy. App. p. 2.

2. Procedural History

The complaint was filed on May 2, 1991 against petitioners and W-UNO. Petitioners answered the complaint, presenting, among others, the "of and concerning the plaintiff" defense under the First Amendment. Petitioners filed a motion requesting dismissal, as a matter of law, on the strength of the allegations contained in the complaint. See App. p. 11, n.4. Petitioners argued that as a matter of law, irrespective of the label or allegation invoked by respondents (i.e., libel, invasion of privacy, emotional distress, etc.) they were bound by the same First Amendment standards applicable to the fifty states, and therefore the decedent's relatives do not have a cause of action for injurious falsehood.

On March 19, 1992, the Superior Court denied the motion, concluding that "the relatives of a person who allegedly has been the object of false publications have a valid and protected cause of action." App. p. 14. What

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[5] Additionally, there are no allegations that petitioners published the names of potential AIDS victims while Mr. Martínez was alive. In other words, the publications came one month after his death and indisputably had no connection to that event.

plaintiffs, respondents herein, have to prove is simply "that damage has occurred, that the originator of the damage was culpable and negligent in his conduct and the damages caused." Id.

Petitioners filed a Writ of Appeal to the Supreme Court of Puerto Rico on April 22, 1992, based on First Amendment case law. We pointed out that this issue has never been before that court. On November 13, 1992 review was denied "in this stage of the proceedings."[6] App. p. 16. A petition for rehearing was filed, arguing that the crucial issue would not vary in any other "stage" of the case: even after discovery and trial, the basic fact would remain unaltered: the 17 plaintiffs were not mentioned in the publications. Petitioners also requested that the appeal be consolidated with three (3) other El Vocero cases based on the "of and concerning" defense which have been pending review for several years before that court.[7] In the Resolution of December 18, 1992, the court "denies said petition and the motion requesting consolidation with other appeals." App. p. 17.

As a result, the Supreme Court of Puerto Rico has implicitly recognized the respondents a cause of action for both libel and invasion of privacy. It has sanctioned the view that the First Amendment requirement that a publication be "of and concerning the plaintiff", as an element of a cause of action for libel or invasion of

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[6] Associate Judge Rebollo-López would have granted the appeal; Chief Judge Andreu-García disqualified himself.

[7] *Campoamor v. El Vocero*, CE-90-123, *Gonzalez v. El Vocero*, RE-90-337 and *Rodríguez v. El Vocero*, CE-91-414, however, are libel cases.

privacy, is not applicable to a plaintiff who is a "private" individual,[8] even if the news items pertain to a matter of legitimate public interest.[9]

REASONS FOR GRANTING THE WRIT

1. The First Amendment requires that a news article of public interest be "of and concerning" a plaintiff in order to recognize him a cause of action for libel.

The "of and concerning the plaintiff" requirement in defamation cases in the common law is of ancient origin.[10] Smolla, *Law of Defamation*, New York (1991) p. 4-35, depicts the norm as follows:

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[8] Not a public official or public figure under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny.

[9] The court below states that even assuming that public interest, the case must go to trial to see if "the alleged invasion of the complainant family's privacy was not *necessary and inevitable nor did it constitute the most adequate way for communicating* the message to the reading public." App. p. 12. (Emphasis supplied).

[10] The early cases, many predating the First Amendment itself, focused on the requirement as a common sense matter. It is difficult to conceive that an individual's reputation could be affected by an utterance, written or verbal, that does not specifically refer to that individual. See, e.g., *Wiseman v. Wiseman*, 79 Eng. Reprint 92 (1906); *Roach v. Garvan*, 126 Eng. Reprint 683 (1742); *Bourke v. Warren*, 172 Eng. Reprint 138 (1826) (Abbott, C.J.); Gatley, "On Libel and Slander" (London, 1981). New York and Virginia cases referred to the requirement as a settled element required of the plaintiff in *Sumner v. Buel*, 12 Johnson Rep. 475 (1815), and *Cave v. Shelor and Wife*, 4 Va. Rep. Annot. 362, 2 Munford 193 (1811). See also, in general, *Hargrove v. Oklahoma Press Pub. Co.*, 265 P. 635, 637 (1928); Newell, *Libel and Slander*, (4th Ed. 1924), § 220 and cases cited therein; Note, *Developments*

> To be actionable the defamatory statement must be understand as being "of and concerning" the plaintiff. It is axiomatic that there is no such thing as defamation in the air; the defamatory words must refer to someone, and because defamation is a recipient-centered tort, the reference must be understood.
>
> The plaintiff need not be cited by name for the defamation to be "of and concerning" him. If there is no explicitly literal reference, the plaintiff must sustain the burden of pleading and proof, by way of "colloquium", that the defamatory statement refers to him. If the burden is not met there is no defamation and the case is dismissed. [notes omitted]

Although in a 1937 press case reference was made to a constitutional rationale behind the common law requirement,[11] it was not until the decision in *New York Times*, supra, 376 U.S. at 288-292 (1964), that this Court acknowledged the "of and concerning" requirement as a First Amendment safeguard available to the press in libel cases:

> We also think the evidence was *constitutionally defective* in another respect: it was incapable of supporting the jury's finding that the allegedly

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in the Law of Defamation, 69 Harv. L. Rev. 875, 917-933 (1956); Sanford, *Libel and Privacy* (2d Ed. 1991), pp. 120-123.

[11] The rule was seen as a "sound compromise" between the conflicting interests in libel cases in *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502, 505 (D.C. Cir. 1937) ("On the one hand is the social interest in free press discussion of matters of general concern, and on the other is the individual interest in reputation.").

> libelous statements were made "of and concerning" respondent. [Emphasis ours]. Id. at 288.

Two elements are worthy of note. First, there must be evidence that the publication specifically referred to the plaintiff; if the uncontroverted evidence would not support a jury verdict in that regard, the court must adjudicate the legal issues independently.[12] Secondly, there is no indication that the requirement depends on the status of the plaintiff as a public official or "private" individual.

In *Rosenblatt v. Baer,* 383 U.S. 75 (1966), this standard would be reiterated as a requirement arising from the First Amendment.

> We held that evidence that Sullivan as Police Commissioner was the supervisory head of the Police Department was constitutionally insufficient to show that the statements about police activity were "of and concerning" him; we rejected as inconsistent with the First and Fourteenth Amendments the proposition followed by the Alabama Supreme Court in the case[.]
>
> . . .
>
> There must be evidence showing that the attack was read as specifically directed at the plaintiff. Id., at 82-83.

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[12] Although *New York Times* was not decided on summary judgment, the cited text suggests that if uncontroverted pleadings make trial superfluous as to whether the publication refers specifically to the plaintiff, summary judgment should be granted against the plaintiff. This result would be expected a fortiori in Puerto Rico courts, where there are no juries in civil proceedings.

The common law requirement that a publication be "of and concerning" is now part of the First Amendment safeguards available to the press. The States, as well as Puerto Rico,[13] are not free to ignore this requirement, in the same way and for the same reasons that they cannot impose liability without the requisite proof of fault, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-349 (1974) (negligence), or *Harte-Hanks v. Connaughton*, 491 U.S. 657, 668 (1989) (actual malice); or without the requisite proof of falsity, *Hepps v. Philadelphia Newspapers, Inc.*, 475 U.S. 767 (1986).[14]

The respondents cannot maintain a cause of action for libel against petitioners, where it is uncontroverted that the publications are not "of and concerning" them. The articles clearly pertain to Mr. Martínez by name; we are not dealing with an ambiguous reference that could

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[13] First Amendment rights have been recognized to apply to U.S. citizens in Puerto Rico to the same degree as citizens from any of the 50 states and the District of Columbia. *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328, 331 (1986); *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979); *Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922). See also, *Schneider v. State*, 308 U.S. 147, 160 (1939); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Near v. Minnesota*, 283 U.S. 697, 707 (1931). This limitation has been recognized by the Puerto Rico Supreme Court. See, *Villanueva v. Hernández Class and El Vocero*, 91 JTS 58, p. 8697 (1991); *Clavell v. El Vocero*, 15 Off.Trans. 902 (1984); *Aponte Martínez v. Lugo*, 100 PRR 281 (1971); the norm receives lip service from the court below, App. p. 13-14.

[14] See also *New York Times*, 376 U.S. at 378-380; *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-511 (1984).

conceivably include other persons, including the respondents. Therefore, regardless of the evidence that could be produced at the trial stage, that decisive fact shall remain unaltered.

2. The requirement applies to any cause of action based on injurious falsehood, regardless of the specific state law label.

The "of and concerning" requirement has also been recognized through the years in cases involving privacy, instead of reputational interests, since both are held to be personal and non-transferable.[15] The fact that plaintiffs are relatives of the person actually referred to in the publication does not bring about a relaxation of the requirement.[16]

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[15] *Geisler v. Petrocelli*, 616 F. 2d 636, 639 (2d Cir. 1980); Smolla, *Law of Defamation*, New York (1991), pp. 10-15 – 15-16. *Memphis Dev. Fd. v. Factories, Etc., Inc.*, 616 F. 2d 956, 957 (6th Cir. 1980); *Maritote v. Desilu Productions Inc.*, 345 F. 2d 418, 419 (7th Cir. 1965); cert. den. 382 U.S. 883 (1965); *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F. 2d 9, 12 (5th Cir. 1962); *Ravellette v. Smith*, 300 F. 2d 854, 857 (7th Cir. 1962); *Rozhon v. Triangle Publications*, 230 F. 2d 359, 361 (7th Cir. 1956); *Service Parking Corp. v. Washington Times Co.*, 92 F. 2d 502, 505-506 (1937). See also, *Nelson v. Maine Times*, 373 A. 2d 1221, 1225 (Me. 1977). *Lugosi v. Universal Pictures*, 139 Cal. Reptr. 35 (1977); *Kelly v. Johnson Pub. Co.*, 335 P.2d 659 (1958); *Abernathy v. Thornton*, 83 So. 2d 235 (1955). See also the **Restatement 2d of Torts** (1977) § 564, comment a, and § 580A, comment g.

[16] *McBeth v. United Press International, Inc.*, 505 F.2d 959 (5th Cir. 1974), cert. den. 421 U.S. 976 (1975); *Wilson v. Retail Credit Co.*, 325 F.Supp. 460, 463 (S.D. Miss. 1971); *Wildstein v. New York Post Corp.*, 243 N.Y.S. 2d 386 (1963), aff'd, 261 N.Y.S. 2d 254

New York Times and its progeny have eliminated common law concepts in favor of the "breathing space" necessary for a vigorous public debate. It is entirely logical that those elements of the common law that tend to contribute to the openness of that debate, which is paramount in a democracy, should be protected under the First Amendment. While strict liability and presumption of damages have been constitutionally prohibited, it is totally consistent that a plaintiff be required to show that a publication specifically refers to him as a prerequisite for a libel action.

In terms of the safeguards established by *New York Times* and its numerous progeny against press self-censorship, there is no recognizable basis for distinguishing between libel and *invasion of privacy* cases, at the very least when the latter are based on the publication of an allegedly injurious falsehood.[17] Application of First Amendment standards cannot depend on the label affixed on a cause of action under state law by a plaintiff, and such a label should be deemed irrelevant in determining whether in a given case certain constitutional

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(1965). See also, *Gugliuzza, et al. v. KCMC, Inc.*, 20 Med.L.Rptr. 1866, ___ La. ___, (1992); and *Maritote, Santiesteban, Rozhon, Abernathy* and *Kelly*, **supra.**

[17] At times, as a practical matter it is difficult to distinguish between both causes of action. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 383-384 (1966) ("Although not usually thought of in terms of 'right of privacy,' all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right to privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be and element bearing on such damage.") Id., n.9.

defenses are available to the press. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Cohen v. Cowles Media Co.*, 115 L. Ed. 2d 586, 589 (1991);[18] *Blatty v. New York Times*, 728 P.2d 1177, cert. den. 108 S. Ct. 1107 (1986). In the *Falwell* decision, for instance, plaintiff brought several causes of action under differing denominations (libel, intentional infliction of emotional distress, and invasion of privacy), prevailing in the court of instance only in that of intentional infliction. Later this Court dismissed that cause of action, holding that the limitations of the First Amendment were equally applicable to it.

The correct focus is the nature of the publication itself and the relative importance of the interests involved. Decisive significance should not be given to perceived differences between a cause of action for libel and one for "false light" invasion of privacy, where the alleged damage goes to the name or honor of a person.

If the topic of a newspaper article is one that should be protected under the First Amendment concepts established under *New York Times* and its progeny, that protection must not be made to depend on the label placed by plaintiffs on a cause of action. This would remove all predictability from the pre-publication review regularly performed by the mass media. *New York Times* standards

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[18] Although in a different context, see *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (access to preliminary proceedings under the First Amendment "cannot be resolved solely on the label we give the event, i.e. 'trial' or otherwise"). Regarding the relative interchangeability of labels and the propensity towards "creative pleading", see Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution* (1983) 23 Wash.L.J. 24, 30-44.

must be anchored on familiar concepts if they are to fulfill their stated function. Allowing lawsuits by unnamed individuals would signify a "chilling effect" of disturbing proportions, precisely the opposite of the vigorous debate that the First Amendment is supposed to guarantee.

3. Application of the "of and concerning" requirement under the First Amendment should not depend on the status of the plaintiff as a public official or a public figure.

The court below made reference to *New York Times* and *Rosenblatt*, as well as *Falwell*. App. p. 3. It distinguished the first two cases because they involved "public official" plaintiffs, and the third because it dealt with a "public figure". It held, therefore, that this Court's case law in "legal suits brought forth by false publications has not resolved that the relatives of a person object of said publications do not have a cause of action of their own." Id. It specifically concluded that the cited cases left the court, "in the absence of any constitutional impediment," free to recognize the respondents a cause of action. App. p. 6.

Although coincidentally in the cited cases plaintiffs were not "private" individuals, we fail to find justification for distinguishing the present case in that regard. Additionally, the well-settled common law doctrine that existed prior to *New York Times* and *Rosenblatt* certainly had never dwelled on a distinction or exception based on any "status" of the plaintiff. Distilled to its essence, the

doctrine refused to recognize the possibility of damage to a person's reputation without proof that the expression at least pointed him out. Regardless of the form of the expression deemed defamatory, or the station in life of the plaintiff, he had to bring forth evidence that the statement was "of and concerning" him.[19]

A "private" individual must prove the same basic element of identification that a "public official" must establish. It should be understood that *Gertz* prohibits the states and Puerto Rico from recognizing a cause of action for libel to a "private" plaintiff when there is no controversy that the plaintiff was not specifically referred to in an article of public interest.

There are well-settled differences in the burden of proof to be required from a "private" versus a "public" plaintiff under *New York Times*. These have a firm basis in the function of speech regarding public or official conduct, and its effect on public debate. Logic dictates that a potential plaintiff must be able to prove that a certain expression specifically referred to him. A requirement that fault be pleaded hardly would make sense if it is not premised on the existence of an ascertainable individual to whom a certain standard of care is owed.

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[19] Although there may be cases where the absence of reference to any given person could give way to controversy as to who is actually referred to, that is not the case where specific reference by name to one person rules out potential reference to others. The publications by petitioners clearly identified Mr. Martínez as the person who committed suicide.

4. The lower court's recognition of a cause of action should be reviewed "at this stage of the proceeding"

Petitioners are being subject to a judicial process whose existence or continuation cannot be justified. Hence, the denial of the Supreme Court of Puerto Rico to address this issue "in this stage of the proceedings" is misleading.

The decisive issue shall not be altered in any other "stage of the proceeding." Plaintiffs do not even allege that they will attempt to introduce evidence that the publications refer to any of them, individually or as a group. The remarks of the court below leave little room to doubt that a cause of action *has been recognized as a matter of policy* (plaintiffs have a "valid and protected cause of action." App. p. 14) The factual framework of the case is not a real issue: the court of first instance clearly states that its view of the applicable law would not alter "even assuming that the news item published by El Vocero had the public interest of informing about AIDS." Basically, the trial on the merits would focus on the damages allegedly sustained by respondents.[20]

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[20] It is highly disturbing that the court of first instance sees its role in remaining proceedings as one of a "supra-editor" in which the court will review the text of publications, true or false, and see if those expressions were "the most adequate." This judicial function is unprecedented in Puerto Rico. Editors at the present time do not have to justify to the judicial system (or to anyone else, for that matter) their editorial judgment as to choice of topics, words or photographs. Such a posteriori censorship would be a clear intrusion into the editorial process. *Miami Herald v. Tornillo,* 418 U.S. 241 (1974). We submit it would

The philosophical underpinnings of this position constitute a lightly veiled threat to stand *New York Times* on its head; in cases that are not even arguably "of and concerning" the plaintiffs, they only have to convince a judge that El Vocero was "negligent in its conduct" (App. p. 14) because it used certain language in a published article which was "not necessary and inevitable" or the "most adequate way for communicating the message to the reading public." App. p. 12.

CONCLUSION

It is highly important that this Court determine that the "of and concerning" requirement applies to newspaper publications of public interest regardless of the plaintiff's status as a private or public figure. Consistent with First Amendment principles, the focus of the doctrine's application should be the guarantee of "breathing space" to public debate, and concomitant vigor to what has been called the "marketplace of ideas."

Equally important is that the application of the requirement must hinge on whether the expression on which plaintiff bases his claim is an injurious falsehood, regardless of the exact label that could be affixed according to state law. The safeguards built by *New York Times* and its progeny cannot be made to depend on the proficiency of counsel for the plaintiff in affixing a label on the cause of action.

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be unconstitutional even if parameters were given for the fact finding process.

Respectfully submitted, in Washington, D.C. this 22nd day of February, 1993.

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Certified Translation

IN THE SUPERIOR COURT OF PUERTO RICO
PONCE PART

CARMEN LUCILA DOMINGUEZ ET AL.	*	
Plaintiffs	*	CIVIL NO. CS-90-1111
v.	*	
CARIBBEAN INTERNATIONAL NEWS CORP. D/B/A EL VOCERO DE P. R.	*	RE: DAMAGES

RESOLUTION

Plaintiffs in the above-captioned case, relatives of the decedent, Luis Martínez Bayó, brought before this forum a complaint for damages against Caribbean International News Corp., an enterprise that publishes El Vocero newspaper (hereinafter El Vocero), the writer for that newspaper, Mr. Tomas de Jesús Mangual and radio broadcasting station WUNO Notiuno, Inc.

It is alleged in the complaint that on February 17 and 23 of 1990, codefendants Caribbean International News Corporation and Tomas de Jesús Mangual published in El Vocero newspaper, in a false and negligent manner, with total contempt for the truth, a news item to the effect that decedent, Mr. Luis Martínez Bayó, had carnal relations by paying a supposed prostitute called Rosana, that she died as a result of a disease called Acquired Immunodeficiency Syndrome (AIDS), that the name of Mr. Luis Martínez

Bayó appeared on a list of said prostitute's clients, which list she allegedly gave to the physicians who attended to her during her illness, that said list included a group of "number racket mafiosi" and that Mr. Luis Martínez Bayó, upon learning that his name appeared in said list, "could not overcome the shock he received because of this chilling news and blew out his brains through a shot on the head".

Likewise, it was alleged that on February 23, 1990, codefendant WUNO-NOTI-UNO, INC., also in a false and negligent manner, with total disregard for the truth, broadcasted on the radio through one of its radio commentators, the previously mentioned false information.

It was also alleged that said publications constitute an abusive and unjustified attack to the honor, the reputation and the private and family life of plaintiffs, as well as a merciless contempt for the feelings of the latter, for which reason all and each one of the plaintiffs has undergone and continues to undergo great anguish and suffering; they have been subjected, besides, to public mockery and ridicule, which has caused them great humiliation.

After several legal procedures, El Vocero and codefendant Tomas de Jesús Mangual presented a "Motion Requesting Judgment on the Allegations" wherein, in essence, it is held that the relatives of a dead person who was the object of an alleged false publication do not have, as a matter of law, a cause of action of their own. Said contention is based on arguments of constitutional nature.

Plaintiffs presented an "Opposition to the Motion Requesting Judgment for the Allegations" which, in turn, was answered by El Vocero and Tomas de Jesús Mangual.

An analysis of the American doctrine and jurisprudence, and of our jurisdiction, that are applicable makes imperative that the motion presented by defendant be denied.

The federal jurisprudence that has attended to the constitutional problem presented by legal suits brought forth by false publications has not resolved that the relatives of a person object of said publications do not have a cause of action of their own. In contrast, the boundaries imposed by the First Amendment of the United States Constitution limit the actions of public figures who have been the object of libel, requiring that the existence of actual malice be shown, *New York Times v. Sullivan*, 376 U.S. 254 (1964); and in fact, they limit the right to bring suit against a publication containing true private information, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[1] Nevertheless, nothing indicates that the limits to actions by relatives have a constitutional origin.

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[1] *Rosenblatt v. Baer*, 383 US 75 (1966), a case cited by defendants in their Motion to Dismiss is distinguishable and inapplicable to the instant case because the former had to do with a municipal public official, who has to prove actual malice to establish his claim, who presented his suit alleging libel as a consequence of a publication that addressed an imputation of possible corruption against the government institution of which the public official had been part and not against him in his private character.

Hustler Magazine v. Falwell, 485 US 46 (1988), is also distinguishable and inapplicable because it deals with a claim

In the American jurisdictions, the problem of actions by relatives is really one of common law or of a statutory nature; which each jurisdiction solves in accordance to their laws in effect. In that sense, two views of the problem have been developed; the majority view holds that in the absence of reference to the relatives in a publication, these do not have the right to a cause of action for invasion of the right of privacy. The other view, which is the minority one, holds the opposite. [See in general, *Invasion of Privacy by Publication Dealing With One Other than Plaintiff*, 18 ALR 3d 873 (1968)]. The Georgia jurisdiction seems to be the one which has accepted most solidly this minority position. See *Cox Broadcasting Corp. v. Cohn*, 200 S.E. 2d 127 (1973). A clear sample of the *validity of the law in effect* is the case of *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (1979). In it, the United States District Court for the District of Texas faces a claim for damages brought by the parents of a murdered young man, against a television station that broadcast a news item that established the relation between the death and a homosexual relationship. The District Court, in the absence of clear jurisprudence in the Texas jurisdiction, discussed the two views in effect in other state jurisdictions which had faced the problem. The analysis led the Court to the conclusion that the majority position in the American jurisdictions is to the effect that the relatives of the

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brought by Jerry Falwell, a known public figure and controversial evangelist American minister, against a pornographic magazine of general circulation in all of the United States.

The deceased Luis Martínez Bayó and the plaintiffs members of his family cannot be considered public officials nor public figures for the purpose of this suit.

deceased lack a cause of action for invasion of privacy, own or inherited; and that, by contrast, the minority position allows this type of action.[2]

From a statutory point of view, jurisdictions like Rhode Island have recognized a specific cause of action to the descendants of a deceased person who has been

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[2] The Court, upon discussing the two views stated the following: "Under at least three of the categories, the right to privacy is considered personal in nature. The Restatement of Torts 2d provides that: Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded. The case of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his. Restatement [Second] of Torts, Sec. 6521 (1977); See also W. Prosser, supra, at 814-15. Under the majority view, the deceased's relatives may not maintain an action for invasion of privacy, either based on their own privacy interests or as a representative for the deceased, where the alleged invasion was directed primarily at the deceased . . . There are cases which support the minority view that the deceased relatives may recover for the invasion of their own privacy interests, most notably the jurisdiction of Georgia . . . In summary, the court believes that the majority rule should be applicable under Texas law. Therefore, the plaintiffs cannot maintain this action for invasion of their right of privacy where the defendants' broadcast makes no reference to them. They likewise cannot maintain an action for invasion of their son's right of privacy since the right is personal. *The court recognizes that the minority view has a certain theoretical support but also believes that the majority position is not irrational.* The defamation law of Texas also provides some analogy for determining the proper approach under Texas law with respect to privacy actions." (Supplied emphasis) pp. 147-148.

defamed in a publication, be it either in a newspaper, through the radio or on television.[3]

In accordance to what has been stated, this Court, in the absence of any federal constitutional impediment, must search for its decisory parameters in the laws that are in effect in Puerto Rico, with special emphasis on the importance that our society, by means of the constitutional and judicial process, has recognized to the right of privacy.

A review of the allegations in the complaint reflects that this action is mainly based on the right of privacy of the plaintiffs. In Puerto Rico this right has a different history and its scope is broader than its counterpart in the federal jurisdiction. *Figueroa Ferrer v. E.L.A.*, 7 Off. Trans. 279 (1978). This constitutional right imposes on every person the obligation to respect and protect the private and family life of the other human beings. To that effect, in face of the nature of the harmful conduct imputed against the defendants and its negative effect on the honor, private and family life of the plaintiffs, the instant cause of action aimed at obtaining an indemnity for the damages caused has constitutional root and origin, and

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[3] R. I. Gen Law Sec. 10-7.1-1: "Whenever a deceased person shall have been slandered or libeled in an obituary or similar account in any newspaper or on any radio or television station within three (3) months of his date of death, and such account would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of said person".

Article 1802 is the statutory mechanism for making it feasible. *Colón v. Romero Barceló,* 12 Off.Trans. 718 (1982).

Mental anguish has been defined under Article 1802 of the Civil Code as those mental and emotional disturbances generated by the culpable and negligent conduct of a determined person and for which the culpable originator shall be responsible as to making amends for the harm caused.

In the area of extra-contractual liability it is a matter of general knowledge that the three elements to be proved are: the culpability or negligent conduct, the damages, and the causal relation between such conduct and said damages. Brau del Toro, *Daños y Prejuicios Extracontractuales,* Publicaciones JTS, p. 141 (1986).

In his analysis of Article 1902 of the Spanish Civil Code, equivalent to Article 1802 of ours, treatise writer Jaime Santos Briz states that the doctrine allows in an unanimous manner the reparation of moral damages. Throughout his discussion and analysis, Santos Briz holds that the reparation of the moral damage does not differ from the reparation of other damage, in the measure in which the cause of action has as an objective repairing in the person of the victim the damaging consequences of a fault. Albaladejo, *Comentarios al Código Civil y Compilaciones Forales,* commented by Santos Briz, Tomo XXIV, *Revista de Derecho Privado,* (1984).

Specifically, as to the grounds for all the causes of action aimed at a compensation for damages due to mental anguish and emotional suffering, Santos Briz explains that:

> [what is being sought is to provide the injured or damaged party a satisfaction for the wrong and affliction caused him, that grants him not certainly an indemnity properly said or a mensurable equivalent to the loss of his peace and joy of living, but indeed a certain compensation for the wrong sustained and for the injustice committed personally against him. From this point of view, the 'pecunia doloris' not only makes reference to the damage suffered by the injured party, but mainly to the acts of the injurer, that is, to the major or minor offensive and reproachable nature of his conduct". Albaladejo, *Comentarios al Código Civil y Compilaciones Forales,* commented by Santos Briz, Tomo XXIV, *Revista de Derecho Privado,* p. 219 (1984).

The Spanish courts have repeatedly recognized the justification of damages for mental and moral anguish. For example, the Judgment of February 7, 1962 expressly indicates that:

> "in modern times it has been accepted in a definite manner the principle of indemnity of moral damages, because although the rights of the personality do not conform to a pecuniary estimate, for which reason money here cannot comply with its role of an equivalence as in the case of an indemnity for a material injury, the victim of moral damages suffers pain, and the indemnity for the material damage, the victim of moral damages suffers pain, and the indemnity serves to reestablish the broken equilibrium, being able, thanks to the money, according to his tastes and temperament, to avail himself of pleasant sensations, or rather, the indemnity agreed to for the injured taking up the shape of

> a satisfactory indemnity to the charge of the one responsible." (Ibid, pages 222-223).

Following the civil tradition, the Supreme Court of Puerto Rico has recognized on several occasions the justification of damages for mental anguish, without imposing any other restriction, provided that there is compliance with the requirements set in Article 1802 of the Civil Code. In *Rivera v. Rossi*, 64 PRR 683 (1945), it was resolved that in order to configure a cause of action there is no difference between physical and moral damages. Our highest judicial forum held in its opinion that:

> "If the moral damage has really existed and is the natural consequence of a culpable and negligent act by the defendant, or the culpability or negligence of the defendant is the immediate cause of the damage, what logical reason, what principle of justice can bring opposition in order to deny its compensation? . . . And if Article 1802 does not distinguish between moral damage and physical damage for the purpose of an indemnity, why should we establish a distinction?" (Ibid, pages 724 and 725).

The principle outlined above was reaffirmed by the Supreme Court of Puerto Rico in *García Pagan v. Shiley Caribbean*, 88 JTS 101 (1988), in the following manner:

> In the local sphere our jurisprudence does not distinguish between physical, material or moral damages for the effect of indemnity . . . Damage is every material or moral injury sustained by a person, either to his natural vital assets, to his property or to his patrimony, caused in contravention of a juridical norm, and for which another is answerable . . . Civil responsibility is precisely the duty to indemnify the injured,

> granting an economic value to the sustained damage. (Ibid, page 6116).

Concerning moral damages, said opinion adds that:

> Although in principle the damages that are intangible, such as suffering, mental anguish and emotional damage, are considered non-patrimonial damages since their pecuniary valuation is not based on a mathematical equivalency, they do not cease to be compensable in money. (Ibid, page 6116).

These doctrinal statements are the consequence of a broad view of the liability or guilt concepts in civil law, which contrast with the compartmentalized view of the common law torts. Concerning the guilt concept it has been stated that it is:

> *"as infinitely broad as the behavior of human beings and it includes any fault by a person which produces an evil or an injury . . . This precept constitutes a general standard for the indemnity of every illicit injury. . . . inclusively when the culpable act contravenes interests or rights guaranteed by the constitution or by legislation that protects civil rights."* *Bonilla et al. v. Chardón et al.* 87 JTS 28 (1987), page 4825. (supplied emphasis).

This broad vision of the guilt concept, proper of the civil law system, must include the imputed conduct of the defendants. According to the civil law principles already outlined and to the mandates of the Constitution of the Commonwealth of Puerto Rico concerning the protection of the people's right of privacy, the Supreme Court of Puerto Rico recognized a cause of action of constitutional origin in the case of *Colón v. Romero Barceló*, 12 Off.Trans 718 (1982).

This case deals with a suit for damages because of the publication of a photo of the son of the plaintiffs, in which his body appeared in a grotesque manner after being murdered, and it was published without due authorization by the parents. The argument presented by plaintiffs in their claim was that the defendants' action constituted an invasion of their privacy which caused them mental anguish and suffering (supra, page 721)

After the Supreme Court of Puerto Rico established that the right of privacy in our county has a history that is different and broader than the one that exists in the federal legislation (supra, page 723), it concluded that the way to vindicate the right to privacy and family integrity is through a cause of action under Article 1802 of the Civil Code.

Colón v. Romero Barceló, (supra), clearly establishes that any person who sustains moral humiliation, mental anguish and emotional suffering as a consequence of a non-essential publication of little or no social value or public interest, and which is not indispensable and inevitable in order to comply with the purpose of communication, can claim an indemnity for the damages suffered as a consequence of the unjustified violation of his right of privacy.

Granting as true[4] the allegations stated in the above-captioned complaint, which accuse the defendants

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[4] Bear in mind that a motion to dismiss admits the certainty of the facts well alleged in the complaint. See *Sierra v. Bird,* 78 PRR 161; *Sacarello v. Junta,* 75 PRR 253; *Boulón v. Pérez,* 70 PRR 941; *Walker v. Tribunal;* 72 PRR 651; *Gonzalez v. Hawayek,* 71 PRR 493; *Pérez v. Hawayek;* 69 PRR 46; *Hernandez v. Ayala,* 68 PRR 883; *De la Cruz v. Gobierno de la Capital,* 68 PRR 496.

of publishing false information whose content allegedly affected the privacy of the relatives close to the deceased, the latter have a cause of action both from the constitutional point of view as well as from the statutory one already set forth.

Even assuming that the news item published by El Vocero had the public interest of informing about AIDS, it must be elucidated on the merits whether the alleged invasion of the complainant family's privacy was not necessary and inevitable nor did it constitute the most adequate way for communicating the message to the reading public.

In resolving the Motion to Dismiss presented by El Vocero and Tomas de Jesús Mangual, in no way are we adjudging the case on its merits. We are aware that in

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The sufficiency of a complaint must be considered in the light of the situation most favorable to plaintiff; thus, a complaint must not be dismissed unless it appears with certainty that the plaintiff does not have a right to any remedy under any situation of facts which could be proved as grounds for the claim in it. See *Cruz v. Ortiz*, 74 PRR 298; *Zalduondo v. Méndez*, 74 PRR 597; *Rodríguez v. Tribunal*, 74 PRR 616; *Cruz v. Ramírez*, 75 PRR 889; *Izquierdo v. Izquierdo*, 80 PRR ___.

The Court, when resolving a motion to dismiss should not determine the final merits of the claim made in the complaint and indeed only consider under the light of the situation most favorable to plaintiff; thus, a claim must not be dismissed unless it appears with certainty that the plaintiff does not have a right to any remedy under any situation of facts which could be provided as grounds for the claim made in it. See *Cruz v. Ortiz*, supra; *Zalduondo v. Méndez*, 74 PRR 597; *Rodríguez v. Tribunal*, 74 PRR 616; *Sacarello v. Junta de Retiro*, 75 PRR 253; *Cruz v. Ramírez*, 75 PRR 889; *Izquierdo v. Izquierdo*, supra; *Candal v. C.T. Radiology*, 12 Off.Trans. 278.

what concerns the applicable law, this Court has the duty of recognizing to the press the minimum guarantees of protection contained in the First Amendment to the Constitution of the United States, as established by the federal Supreme Court. See: *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974); *Schneider v. State*, 308 US 147 (1939); *Lovell v. Griffin*, 303 US 444 (1938) and others.

Our Supreme Court has recognized that the Supreme Court of the United States has the constitutional faculty to dispose the minimum degree of protection of the rights of the American citizens under the protection of the federal Constitution and that, furthermore, this minimum degree of protection standard covers the rights of freedom of speech and of the press. *Aponte Martínez v. Lugo*, 100 PRR 281 (1971).

The law in effect has been widely recognized and reiterated by our Supreme Court in *Clavell v. El Vocero*, 15 Off.Trans. 902 (1984). In said decision our highest forum stated:

> As well as the states of the American Union, Puerto Rico has the faculty to establish its own standards of liability for defamation, provided that absolute liability is not imposed or *that the rules that be adopted do not reduce the minimum content of the First Amendment of the Constitution of the United States. Gertz v. Robert Welch Inc.*, 413 US 323, 347, 349 (1974).
>
> *Subject to these familiar limitations*, it is to the legal codes of Puerto Rico to where one must resort in order to assay the interests involved in defamation cases. In this area, American jurisprudence, state or federal, is only of an illustrative or persuasive nature. Our perception of the

> values involved and the way to conciliate them may be completely different. This situation is not particular to Puerto Rico." (Supplied emphasis; cite omitted).

What we resolve is that in this stage of the proceedings it is not in order to dismiss the complaint for reason that, as a matter of law, the relatives of a person which allegedly has been the object of false publications have a valid and protected cause of action. We contemplate the standard of establishing an adequate balance between the defendants' right to freedom of the press and the right of privacy of the plaintiffs.

In the light of the laws in effect in Puerto Rico, it is not in order to dismiss a cause of action for the mere fact that who claims the damage is not the person mentioned in the publication. Article 1802 of the Civil Code is precise as to the requirements that it establishes in order for an action for damages to prosper. Since it does not distinguish between a claim for mental damages and one for physical damages, what must be proved is that damage has occurred, that the originator of the damage was culpable and negligent in his conduct and that a causal relation existed between his conduct and the damages caused. The action brought by plaintiffs has a constitutional origin recognized by the Supreme Court of Puerto Rico and which this Court is bound to protect.

In accordance to the above-stated reasoning, the "Motion Requesting Judgment on the Allegations" presented by El Vocero is hereby: ***denied.***

Be it notified.
Issued in Ponce, P.R. March 19, 1992.

(Sgd.)
FELIPE ORTIZ ORTIZ
SUPERIOR JUDGE

NOTIFIED:
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Gentlemen:
You are hereby notified with a copy of the instant *RESOLUTION* filed in the instant case.
Ponce, P.R., March 24, 1992.
PAULITA COLON - GENERAL CLERK
BY: (Illegible signature)

(Seal of the Court)

Certified Translation

IN THE SUPREME COURT OF PUERTO RICO

Carmen Lucila Domínguez et al.		Appeal proceeding
v.		from the Superior
Caribbean International News Corp., etc.	No.AC-92-235	Court, Ponce Part

RESOLUTION

San Juan, Puerto Rico, November 13, 1992.

Considering that the Judicature Act provides that any final judgment by a lower court shall be appealable before the Supreme Court, the writ of appeal is hereby denied. After considering same as a petition for certiorari, same is hereby denied in this stage of the proceedings.

Agreed by the Court and hereby certified by the General Clerk. Mr. Associate Justice Rebollo López would issue. Mr. Chief Justice Andreu García disqualified himself.

(Initialed)
Francisco R. Agrait Lladó
General Clerk

Certified Translation

IN THE SUPREME COURT OF PUERTO RICO

Carmen Lucila Domínguez et al.		Appeal proceeding
v.		from the Superior
Caribbean International News Corp., etc.	No. AC-92-235	Court, Ponce Part

RESOLUTION

San Juan, Puerto Rico, December 18, 1992.

Having examined the first petition for rehearing, the Court denies said petition and the motion requesting consolidation with other appeals.

Agreed by the Court and hereby certified by the General Clerk.

(Initialed)
Francisco R. Agrait Lladó
General Clerk